SUPREME COURT, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. A-806

GEORGE NEWSOME and DOYAL CRISWELL,
Petitioners,

vs.

MASON & HANGER-SILAS MASON CO., INC., THE RUST ENGINEERING COMPANY, a Joint Venture, d/b/a MASON-RUST,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

MARGARET BUSH WILSON
4200 West Page Boulevard
St. Louis, Missouri 63113
Attorney for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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To the United States Court of Appeals for the Eighth Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America.

Petitioners pray that a Writ of Certiorari issue first to review the order of the United States Court of Appeals for the Eighth Circuit entered on the 31st day of January, 1972, denying the motion of petitioners for leave to intervene in the case of **National Labor Relations Board v. Mason and Hanger-Silas Mason Co., Inc., The Rust Engineering Co., a Joint Venture d/b/a Mason-Rust,** in which

petitioners were the charging parties, but not petitioners below; and second to review the judgment of the United States Court of Appeals for the Eighth Circuit in said case of October 12, 1971, refusing to enforce the order of the Labor Board.

CITATIONS TO OPINIONS BELOW

The opinion of the Court below is reported at 449 F.2d 425, and is set forth in Appendix "A", *infra*. The order of the Eighth Circuit denying petitioners' motion to intervene is set forth in Appendix "B", *infra*; the findings of fact, conclusions of law and decision and order of the National Labor Relations Board are reported at 179 N.L.R.B. No. 71, and are set out in Appendix "C", *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under provisions of the National Labor Relations Act, 29 U.S.C., Sec. 160(e) and 28 U.S.C., Sec. 1254(1).

The judgment of the Eighth Circuit was entered on October 12, 1971. The application of the charging parties and petitioners here for leave to intervene was filed on January 12, 1972, and the order of the Eighth Circuit denying intervention was entered on January 31, 1972. Applications for extension of time to file a petition for writ of certiorari were granted on January 5, 1972 and February 3, 1972, extending the time to and including March 1, 1972. This petition for writ of certiorari was filed within that time.

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in denying the petitioners the right to intervene.

2. Whether the Eighth Circuit, in refusing to enforce the Board's order, misapprehended and grossly misapplied

the standard of review laid down in **Universal Camera Corp. v. N.L.R.B.**, 340 U.S. 474 and **N.L.R.B. v. Walton Mfg. Co.**, 369 U.S. 404.

3. Whether the treatment of the motivation issue by the Eighth Circuit was inconsistent with recent decisions of this Court in **N.L.R.B. v. Great Dane Trailers, Inc.**, 388 U.S. 26.

STATUTES AND RULES INVOLVED

The relevant provision of the Federal Rules of Appellate Procedure for the United States Court of Appeals is Rule 15(d), Title IV. Said Rule is set out in Appendix "D", *infra.*

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.) are as follows: Sec. 152(3), Sec. 157, Sec. 158(a)(1), Sec. 158(a)(5), Sec. 160(b) and Sec. 160(e) of said Act. Said sections are set forth in Appendix "D", *infra.*

The pertinent provision of the Rules of the Supreme Court of the United States is Rule 23, Section 5, set out in Appendix "D".

STATEMENT

Pursuant to the National Labor Relations Act, 29 U.S.C., Sec. 151 et seq., the petitioners herein (charging parties below) filed charges and the regional director issued a complaint based thereon against Mason-Rust, alleging that Mason-Rust violated Sec. 8 (a)(1) of the Act by denying employment to petitioners herein because of their engagement in protected concerted activities, i.e. joint efforts to end racially discriminatory hiring practices and secure racially integrated working conditions.

Mason-Rust was engaged in the renovation of the "Gateway" ammunition plant for the United States Government in St. Louis, Missouri. Between February and April, 1968, it had a work force of about 700 employees including over 70 carpenters, all of the carpenters being white.

Petitioners, two black union carpenters, applied for and sought persistently in concert to obtain employment, but were never hired. Subsequently, two other black carpenters were hired, the first a member of the union, and the second a non-union member recommended by the first.

Petitioner Newsome filed an unfair labor practices charge against Mason-Rust with the National Labor Relations Board on May 2, 1968. The charge was amended October 23, 1968 to allege that Mason-Rust had also discriminated against petitioner Criswell.

The Board found that Mason-Rust violated Section 8 (a)(1) of the Act by denying employment to petitioners because of their engagement in protected concerted activities. It required Mason-Rust to cease and desist, to offer Newsome and Criswell immediate employment, to make them whole for any loss and to post notices.

The Board filed a petition for enforcement of its order in the Eighth Circuit Court of Appeals. The jurisdiction of the Eighth Circuit was properly invoked because the unfair labor practices occurred in St. Louis, Missouri.

The Eighth Circuit refused to enforce, with Mr. Justice Heaney dissenting, on the ground that the Board failed to establish, by substantial evidence in the record as a whole, that Mason-Rust failed to hire because of concerted activities.

For reasons not clear on the record, the Board failed to appeal or seek a writ of certiorari. Prior to this time petitioners had relied on the government attorneys to

protect their interests, and were unaware of their right to intervene. They had not been advised or notified by counsel or the court of the availability of this procedure to them.

Thereafter, petitioners, on their own behalf through counsel retained by them, sought and timely filed first an application for extension of time to file a petition for a writ of certiorari to the Supreme Court of the United States, and second for leave of court in the Eighth Circuit to intervene for the purpose of petitioning for said writ.

The Eighth Circuit, with Mr. Justice Heaney dissenting, denied the motion to intervene.

Pursuant to Rule 23, Section 5 of the Rules of the Supreme Court of the United States, and because closely related questions are involved, petitioners seek here in a single petition a review on certiorari of the procedural question of their right as charging parties to intervene, and a review of the question of the legality and properness of the decision of the Eighth Circuit in refusing to enforce the Board's order.

REASONS FOR GRANTING WRIT

I. Petitioners contend that they timely filed their motion to intervene, that under the Act and the **Solien** case, quoted below, their right to intervene is a matter of right and is not a permissive matter within the discretion of the Court:

> "By filing charge of unfair labor practice with the National Labor Relations Board charging party becomes full party before the General Counsel in investigative stage, before trial examiner after complaint is issued and with full appellate rights, before the Board on review of trial examiner's decision, in Court of Appeals after Board's decision, **and with right independently to seek certiorari from the Su-**

preme Court". (emphasis ours) NLRB Act, § 8(f)(4) B, 10(1) as amended, 29 U.S.C. § 158 (f) (4) (B), 160 (1); **Solien for and on Behalf of NLRB v. Misc. Drivers and Helpers Union Local No. 610**, 440 F. 2d 124.

In **International Union, UAW, Local 283 v. Scofield**, 382 U.S. 205, this Court held that the National Labor Relations Act, though silent on the subject must be read as intending to confer an absolute right of intervention in a court of appeals on the party who was successful in the proceeding before the Board. Said the Court at page 217:

> "the problem of whether intervention should be granted to the successful charging party to the Labor Board proceedings presents considerations somewhat distinct from the case of the intervening charged party . . . Still, we believe that Congress intended intervention rights to obtain".

II. Joint efforts to end racially discriminatory hiring practices and secure racially integrated working conditions have been recognized as protected activities under Section 7 of the Act. **Tanner Motor Livery**, 148 N.L.R.B. 1402 (1964), approved in this regard, **N.L.R.B. v. Tanner Motor Livery, Ltd.**, 349 F. 2d 1, 3 (C.A. 9, 1965), 419 F.2d 216, 218, 223 (C.A. 9, 1970); see also, **United Packinghouse, Food and Allied Workers International Union, AFL-CIO v. N.L.R.B.**, 416 F.2d 1126, 1134-1135 (C.A.D.C., 1969) cert. denied, 396 U.S. 903. For, as stated by the Supreme Court in a case arising under the Norris-LaGuardia Act (**Negro Alliance v. Sanitary Grocery Co.**, 303 U.S. 552, 561 (1938)):

> "The desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion, and the removal of discrimination against them by reason of their race or religious belief is quite as imporant to those concerned as fairness and equity in terms and conditions of employment can be

to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purposes or the express terms of the Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon difference of race or color."

In viewing the issue of discrimination against job applicants rather than incumbent employees, these same principles would apply. This follows from the language of Section 2(3) of the Act which states that the term "employee" shall "include any employee and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise." As the Board noted (A 20), "there are no words of special limitation" in Section 7, which defines the rights guaranteed employees by the Act, or in Section 8(a)(1) which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of those rights. For these reasons, this Court has said: "An employer has the right, absent a contract, to pick and choose his employees and hire those he thinks will best suit his business. However, an employer cannot discriminate against an applicant because of his membership in a union or his views on protected activity under the Act." **Reliance Insurance Companies v. N.L.R.B.**, 415 F.2d 1, 6 (C.A. 8, 1969). Accord: **Phelps-Dodge Corp. v. N.L.R.B.**, 313 U.S. 177, 191-193 (1941); **Time-O-Matic, Inc. v. N.L.R.B.**, 264 F.2d 96, 99 (C.A. 7, 1959); **N.L.R.B. v. T.I.L. Sportswear Corp.**, 302 F.2d 186, 189-190 (C.A.D.C. 1962). Compare, **N.L.R.B. v. Texas Natural Gasoline Corp.**, 253 F.2d 322, 325 (C.A. 5, 1958).

The Board found that the Company's conduct in the instant case violated Sec. 8(a)(1) of the Act as the Company failed to hire job applicants Newsome and Criswell because of their persistent, concerted efforts to gain employment at the Gateway plant for themselves and other blacks. That the Company did so does not require direct proof of unlawful motive, but can be established through legitimate inferences drawn from its conduct. **Mead and Mount Construction Co. v. N.L.R.B.**, 411 F.2d 1154, 1157 (C.A. 8, 1969); **N.L.R.B. v. Melrose Processing Co.**, 351 F.2d 693, 698-699 (C.A. 8, 1965); **N.L.R.B. v. Monroe Auto Equipment Co.**, 368 F.2d 975, 980 (C.A. 8, 1966).

Intent is subjective and in many cases the discrimination can be proved only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, the Board is free to draw any reasonable inference. **N.L.R.B. v. Melrose Processing Co.**, *supra*, 351 F.2d at 698. Accord: **Ames Ready-Mix, Inc. v. N.L.R.B.**, 411 F.2d 1159, 1161 (C.A. 8, 1969).

The record in this case is replete with facts and examples of the "run around treatment" accorded Newsome and Criswell and the ultimate affront to them by the Company in hiring two other blacks in their stead. These facts are prima facie evidence that the Company failed to hire them because of their concerted activities, and the burden shifted to the Company to produce a persuasive lawful explanation for their treatment. The record shows that the Company "offered no explanation for its failure to hire Newsome and Criswell" (A 8-14, 28-29).

In this state of the facts a reviewing court may not "displace the Board choice between two equally conflicting views, even though the Court would justifiably have made a different choice had the matter been before it de novo". **N.L.R.B. v. Walton Mfg. Co.**, 269 U.S. 404, 405 (1962); **Universal Camera Corp. v. N.L.R.B.**, 340 U.S. 474, 488 (1951).

In addition, there are special and important reasons for seeking review here, because the present decision weighs heavily and adversely upon not only the two black carpenters who are the petitioners herein, but upon the existing plight of black construction workers in the United States who are members of unions generally, and particularly in the greater metropolitan area of St. Louis, where as recently as December, 1971 and January, 1972, blacks who are construction workers and union members, or eligible to become union members, particularly the unions of the Carpenters, Plumbers and Cement Masons have been victims of discriminatory practices and have been compelled to seek redress in the federal courts in order to be hired for federally supported construction work. See Appendix "E", *infra*; **U.S. v. Intl. Assn. of Bridge, Structural and Ornamental Ironworkers, Machine Movers & Riggers, Local 396, etc., et al.**, No. 71-C 559(2) U.S.D.C., Eastern District, Eastern Division of Missouri; **U.S. v. Tri-County District Carpenters Council**, 6 Cir. C.A., Jan. 4, 1972.

The effect if the present decision of the Eighth Circuit stands, will be to discourage black union members from filing valid complaints of unfair labor practices based on concerted efforts to secure racially integrated working conditions, and thereby foreclose the use of an important remedy and dilute the efficacy of engaging in concerted activities to seek an end to racially discriminatory hiring practices and to secure racially integrated working conditions. Moreover, the decision does violence to a national labor policy which supports fair and equitable conditions of employment on the part of persons of any race.

In the instant case, the court below has failed to give effect to the provisions of Section 10(e) of the Act; the Board's duly conferred jurisdiction has been invaded so that its statutory duties cannot be effectively fulfilled and the plight of black union members and those eligible

to become union members in the construction trades has been substantially retarded at a time when there is a crucial need for the resources and power of government to be positive, responsive and effective in redressing ancient wrongs.

Review by this Court is thus warranted.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted

MARGARET BUSH WILSON
Attorney for Petitioners

February, 1972

Proof of Service

The undersigned hereby certifies that on the 29th day of February, 1972, she served three (3) copies of the foregoing Petition for Writ of Certiorari on Attorneys for the Respondent, Mason and Hanger-Silas Mason Co., Inc. The Rust Engineering Co., a joint venture d/b/a Mason-Rust by mailing said copies by United States Mail, postage prepaid, to Thomas M. Hanna, 1153 Pierre Laclede Building, 7701 Forsyth Boulevard, St. Louis, Missouri, 63105.

The undersigned further certifies that on the same date she served three copies of said Petition herein on the National Labor Relations Board by mailing copies of the Petition herein by United States mail, postage prepaid, to Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D.C.

Margaret Bush Wilson
Attorney for Petitioners